IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963.

No. 449

A QUANTITY OF COPIES OF BOOKS, HAROLD THOMPSON AND ROBERT THOMPSON, d/b/a P-K NEWS SERVICE,
Appellants,

vs.

STATE OF KANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS.

MOTION TO DISMISS

WILLIAM M. FERGUSON,
Attorney General,
State House,
Topeka, Kansas,
Attorney for Appellee.

Of Counsel:

ROBERT E. HOFFMAN,
Assistant Attorney General,
WILLIAM CLEMENT,
County Attorney of Geary
County, Kansas.

H. L. MERIDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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Appellee, the State of Kansas, pursuant to Rule 16 of this Court, moves that the appeal herein be dismissed on the ground that the appeal presents no substantial Federal question.

QUESTIONS PRESENTED

There are but two questions of significance presented by this appeal. They are:

I. Are the seized books obscene, and therefore not entitled to the constitutional protection of free speech and press?

II. Did the procedure employed by the State in accordance with G.S. of Kansas, 1961 Supp., 21-1102(c), in seizing the books violate the Constitution of the United States?

STATUTE INVOLVED

The statute involved is entitled: *Obscene literature; unlawful acts; penalty; test as to obscenity.*

This statute is quoted in the appendix of the jurisdictional statement. Pertinent portions are as follows:

"(a) Any person who shall * * * sell * * * or distribute any book, * * * containing obscene, immoral, lewd or lascivious language, * * * manifestly tending to the corruption of the morals of persons * * * shall be guilty of a misdemeanor. * * *

"(b) The test to be applied in cases under subsection (a) of this section shall not be whether sexual desires or sexually improper thoughts would be aroused in those comprising a particular segment of the community, the young, the immature or the highly prudish, or would leave another segment, the scientific or highly educated or the so-called worldly wise and sophisticated, indifferent, and unmoved. But such test shall be the effect of the book, picture or other subject to complaint considered as a whole,

not upon any particular class, but upon all those whom it is likely to reach, that is, its impact upon the average person in the community. The book, picture or other subject of complaint must be judged as a whole in its entire context, not by considering detached or separate portions only, and by the standards of common conscience of the community of the contemporary period of the violation charged."

21-1102c. *"Same: search warrant; seizure and destruction, when.* Whenever any district, * * * court judge * * * shall receive an information * * * signed and verified upon information * * * by the * * * attorney general, stating there is any prohibited lewd, lascivious or obscene book, * * * as set out in section 1 [21-1102] (a) of this act, located within his county; it shall be the duty of such judge to forthwith issue his search warrant directed to the sheriff * * * to seize and bring before said judge * * * such a prohibited item or items. Any peace officer seizing such item or items * * * shall leave a copy of such warrant with any manager * * * and said warrant shall serve as notice to all interested persons of a hearing to be had at a time not less than ten (10) days after such seizure. At such hearing, the judge * * * issuing such a warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the provisions of this act."[1]

STATEMENT

This is an appeal by interveners Harold and Robert Thompson, d/b/a the P-K News Service, Junction City,

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1. It will be noted that the language of the statutory test for obscenity is taken directly from *Roth* v. *United States*, 354 U.S. 476.

Kansas, from a decision of the Kansas Supreme Court affirming the finding of the District Judge of Geary County, Kansas, that all copies of thirty-one different titles of books under a single publishing label found on intervenors' premises (pursuant to an *in rem* proceeding under the Kansas statute) are obscene and an order for destruction of said books entered by the trial court on September 19, 1961.

The action was instituted on an Information filed with the Court by William M. Ferguson, as attorney general for Kansas, on July 24, 1961 (R. 4, 5). The Information was verified by him upon information and belief as required by the statute (R. 50). The verified Information, together with copies of seven different titles of books, each bearing the inscription on the face "This is an original Nightstand Book", was furnished to the District Judge at his home at about 5:00 p.m. on said date (R. 22). Thereafter, at the courthouse, in chambers, at 8:30 p.m., the District Judge held a short *ex parte* proceeding (R. 5), at which time he ordered a Warrant issued forthwith (R. 6).

The Warrant commanded the searching for and seizure of specific books listed by title in the caption of the Warrant (R. 6, 8, 48 and 49). The sheriff, in executing the Warrant, seized only books so listed (R. 8, 48 and 49).

The Search Warrant contained a Notice of Hearing which was set for August 7, 1961, at 10:00 a.m., in the courtroom in the courthouse at Junction City, Kansas (R. 7). The sheriff of Geary County executed the Warrant, seizing numerous copies of many of the titles of books listed in the caption of the Warrant, on the 26th day of July, 1961, and at the same time left a copy of the the Warrant and Notice of Hearing with one Zeldia Tib-

bits, bookkeeper at the P-K News Service at the premises described on the Warrant.

On August 7, 1961, the day named in the Notice as the day for hearing on the question of obscenity of the books, Harold Thompson and Robert Thompson, as owners and distributors of said books, filed a Motion to Quash the Information and Warrant on various constitutional grounds, but particularly on the grounds that the statute under which the action was commenced and the procedure followed by the state in support of the seizure of said books constituted a violation of free speech and press as guaranteed by the First and Fourteenth Amendments to the Constitution of the United States and Sections 11 and 18 of the Kansas Bill of Rights (R. 9), which Motion was argued on the same date (R. 17).

At this hearing it was the appellants who attempted to restrict the community to the area of Junction City, Kansas, or Geary County (Tr. A-8, 9, 10, 11, 12 and 13), by placing an Assistant Attorney General on the witness stand. The state specifically rejected this concept of "community" (Tr. A-29, 30).

The trial court's attention was directed to the statutory standards for determining whether the seized books were obscene, and his attention had also been directed to the decision of this Court in *Marcus* v. *Search Warrants*, 367 U.S. 717 (1961), prior to the issuance of the Warrants (Tr. A-31, 32).

On the following day, August 8, 1961, defendants filed a Motion for Continuance which was sustained by the Court and the matter set for hearing on the merits on September 14, 1961 (R. 17). On August 11, 1961, the Court overruled interveners' Motion to Quash (R. 17). On September 6, 1961, intervener-appellants filed a Mo-

tion for a Jury Trial (R. 12) which, after argument, was by the court overruled on September 11, 1961 (R. 18). Finally, on September 14 and 15, 1961, the matter was tried on the issue of whether or not the books seized were obscene (R. 16). The books seized were introduced in evidence pursuant to a stipulation that they were, at the time of seizure, being kept for sale by appellant interveners (R. 28). Appellant interveners, after unsuccessfully demurring to the evidence on the ground that the state had not introduced any evidence to establish "contemporary community standards" (R. 28), proceeded to introduce evidence for that purpose in the form of a number of works of literature containing passages describing sex activity (R. 29, 30 and 31). These works were the property of the Public Library in Junction City, Kansas. The town librarian York, however, on cross-examination, testified that, out of a population of 20,000 in the city, the library had only 4,200 outstanding library cards, of whch half were adult cards and half were inactive (R. 32). She further testified that requests for the works introduced by appellants came from persons in the community who were part of the community's "educated class" (R. 32).

The balance of appellants' evidence was testimony by purported expert witnesses of a comparison between the seized books and said literary works. Appellants made no pretense that any of their witnesses were by any standard average members of any community. For example, witness Howard, a librarian in Lawrence, Kansas, holds a Master's Degree in Library Science (R. 32) and is a family man of religious inclination with a religious family background (R. 33). Witness Lichtman is a Professor of Literature at a large university who taught at Yale University before coming to the Middlewest. He

received his Bachelor's degree from the University of Pennsylvania and holds a Master's and Ph.D. from Yale (R. 35, 36). Witness Rubenstein is a professor at the University of Kansas and holds the degrees of Master of Arts and Master of Library Science (R. 37). Three of the four witnesses used by appellants were librarians and each of the three indicated none of the seized books were in his library. After this testimony, the defense rested.

On September 19, 1961, the trial court, in a memorandum decision, found all of said books to be obscene material and ordered their destruction (R. 19). On the same day intervener appellants moved the court for a new trial, which Motion was heard and overruled on September 26, 1961 (R. 20). Timely Notice of Appeal was served and filed by intervener appellants on September 29, 1961 (R. 15).

After briefing and argument, the Kansas Supreme Court affirmed the findings and rulings of the District Court in an opinion filed March 2, 1963 (R. 118). It is from this decision that the instant appeal was taken.

On August 5, 1963, a transcript of the testimony before the trial court was filed with the Clerk of the Kansas Supreme Court and forwarded with the record to the Clerk of this Court. This transcript was not before the Kansas Supreme Court when the opinion appealed from was filed. The record before that court consisted solely of the appellants' abstract of the trial record.

ARGUMENT

No Substantial Federal Question Is Presented by This Appeal.

The Books which are the subject of this appeal are obscene and as such are not entitled to the constitutional protection of free speech and press.

None of these books has any semblance of literary merit. They are a part of the smut peddling business which Cleveland Amory has characterized as "Paperback Pornography." He begins his article in the April 6, 1963, *Saturday Evening Post* by saying:

> "It is no secret these days that in the field of paperback books the big best sellers are the Erskine Caldwells, Henry Millers, Harold Robbinses, Irving Wallaces, Grace Metaliouses, et al. Compared to the real hardcore paperback pornography which has followed in their wake, however, these are boy scout manuals."

The only designation of publication contained in each book is:

"This is an Original Night Stand Book". Amory lists Night Stand publications as being within this category.

Life magazine's lead editorial "Is Any Book Legally Obscene Any More" in its September 27, 1963, issue (see appendix) quotes with favor Mr. Justice Frankfurter's position deploring "dirt for dirt's sake, or more exactly for money's sake."

These books are solely concerned with sex. Although sex alone does not constitute obscenity, it is the contention of the State that each of them may be classified as

pornography, or at least bordering on pornography; that they are trash with no social value. Thus considered, it is the contention of the State that each of them is obscene within the test prescribed by G.S., 1961 Supp., 21-1102(b), and subject to seizure and destruction pursuant to 21-1102(c) and, that each of them is obscene and not within the area of constitutionally protected speech and press.

As a guide to the proper constitutional tests to be employed by the Supreme Court of the State of Kansas the State's brief contained the following:

> **CONSTITUTIONAL TESTS FOR OBSCENITY.**
>
> It may be said there are four constitutional tests of obscenity. The Supreme Court in the *Roth-Alberts* Opinion [*Roth* v. *United States*, 345 U.S. 476] laid down three constitutional tests for determining obscenity. They are:
>
> (1) The material must be judged as a whole.
>
> (2) The material must be judged by its effect on the average person, applying contemporary community standards, which "community' under state law would be the state[2]
>
> and
>
> (3) The dominant theme of the material must appeal to prurient interests.
>
> To which tests prescribed by *Roth*, the Supreme Court later in *Manual* v. *Day*, *supra* (1962), added a fourth:
>
> (4) " 'Patent offfensiveness' that is to say the material must be so offensive on its face that

2. The U. S. Supreme Court in *Manual* v. *Day* [370 U.S. 478], concludes the relevant "community" under a federal statute is the nation. It seems reasonable to assume that the "community" under a state statute would be the state.

it affronts current community standards of decency."

The trial court in the case at bar applied the standard of the *Roth-Alberts* decision and also correctly anticipated the *Manual* v. *Day* addition to *Roth-Alberts*. In its memorandum decision the trial court said:

> "The test of obscenity as laid down by the court in the *Roth* case is as follows: 'Whether to the *average person*, employing *contemporary community standards*, the dominant theme of the material taken as a whole appeals to *prurient interests*.' . . . .
>
> * * *
>
> "The Court approved as a further guide . . .: 'A thing is obscene if, considered as a whole, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex, or excretion, and if it goes substantially beyond the customary limits of candor or representation of such matters.'"

Thus, in ordering the destruction of these books, the trial court used the constitutional yardstick prescribed by the Supreme Court of the United States.

Following the suggestion contained in *Manual* v. *Day*, that "'hard core' pornography, or something less, . . ." is the test of obscenity, the following analysis was submitted to the Kansas Supreme Court.

WHAT IS PORNOGRAPHY?

Drs. Eberhard and Phyllis Kronhausen in their book *Pornography and the Law* define an obscene or pornographic book as:[11]

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11. *Pornography and the Law*, Ballantine Books, New York, page 178 (1959).

"A book which is designed to act upon the reader as an erotic psychological stimulant ('aphrodisiac') must constantly keep before the reader's mind a succession of erotic scenes. It must not tire him with superfluous non-erotic descriptions of scenery, character portrayals, or lengthy philosophical expositions. All these are unnecessary trimmings for the writer of 'obscene' books. The idea is to focus the reader's attention on erotic word-images, and not to distract him with side issues and tangents of one kind or another."

The Drs. Kronhausen further analyze pornography as having certain rather well defined attributes (pages 178 to 244), as follows:

(1) Women who figure prominently in pornographic books are generally as anxious to be seduced as men are to seduce them. There is very little foreplay.

(2) The females are generally of the nymphomaniac type and are almost invariably beautiful of face with an overdeveloped figure.

Drs. Kronhausen say at page 227:

"In keeping with the wish-fulfilling nature of 'obscene' writings, the female characters in these stories are just as men would like women to be: highly passionate, sensuous, and sexually insatiable creatures who like nothing better than almost continuous intercourse.

"Conspicious by its absence in 'obscene' writings is any trace of genuine modesty, restraint, or anxiety on the part of the women, which are certainly outstanding characteristics of most females in our culture. For instance, it strikes one immediately that none of the women in any of our ten specimen books [discussed in this chapter] seem to have the least concern about pregnancy in spite of all their promiscuous behavior."

(3) Defloration is coupled with rape and sadism. The female is generally desirous of the act and obtains exotic enjoyment despite the pain. There is seldom any indication of hostility on the part of the female who has been raped.

(4) The males are generally supersexed.

(5) There is an emphasis on Lesbianism. Pornographic books are generally written by males for male consumption. Descriptions of homosexuality between women is assumed to have an erotic effect upon male readers.

(6) Violence and flagellation is common. Cruelties perpetrated upon females are an integral part of pornography.

(7) Sexual orgies involving several persons of both sex are common. So is incest.

Generally speaking, pornography has an unrealistic and dream-like quality. Sexual relations are animal like—without build-up. They are direct and crude. Sex in pornographic books is not related to love nor does it treat sexual relations with realism, in fact, love is almost never mentioned."

These are the characteristics of pornography and these are the characteristics of each book in this case.

Each of these seized books on its face is pornographic. Were the sexual descriptions expurgated, there would be nothing. Appellants have sought to demonstrate that the seized books do not on their face affront current community standards of decency because such books as *Lady Chatterley's Lover*, *Peyton Place*, *The Chapman Report* and *Lolita* contain sexual descriptions which go beyond the candor found in some of the seized books. This may be true, but each of the books introduced into evidence by the Appellants contain literary merits beyond the sexual

descriptions. Moreover, each such book treats sex with realism and not with the pornographic approach utilized in all of the seized books. The seized books are trash—worse than trash. They meet every test of "hard core" pornography. They are without any redeeming social importance.

Each of the seized books contains almost precisely the same number of words. Of the books seized, sixteen have 190 pages, eleven have 191 pages, two have 192 pages and one has 189 pages.

On the front fly leaf of each the publisher endeavors to make the pornographic pitch—"Sex-Hungry Girl", "I'm a Lesbian!", "The Price of Sex", "Whose Lips on Her Body", "Hot Pants Marian", "Give Me Your Body", "Lust-sated Couples", "Whore or Mistress" and so on *ad nauseam*.

On the back of the cover there is a pandering eye-catcher such as "Passion Gone Berserk", "Come Sleep With Me", "Unnatural Sex", "A Loose Woman", "Lusty Holiday", "Problems in Bed", "Once a Virgin", "My Mistress and My Son", "Hungry for Love" and so on and on.

There are but seven different authors for all the books seized.

Examination of these books will reveal they are designed to fit a particular format. They are all the same length and all the same type. In the back fly leaf there is a list of "Other Nightstand Books" with a long list of meaningless, suggestive titles.

By every suggestion and innuendo, these books are directed to appeal to the sexual interest—the prurient interest—of the buyer and the reader.

In order to demonstrate the consistency with which the sexual episodes appear in the seized books, the State

prepared a summary of each book for the Supreme Court of Kansas. This summary is reproduced in the appendix hereto.

The Procedure Followed Pursuant to the Kansas Statute Presents No Federal Question by Reason of Any Violation of the First, Fourth and Fourteenth Amendments to the Constitution of the United States.

Appellants' attack upon the procedure followed by the state in the instant cause is grounded upon (1) the absence of a provision for jury trial, (2) that the seizure provision of the statute constitutes an unconstitutional prior restraint upon publication of the books, and (3) the issuance of the warrant *ex parte*, on an information not positively verified, violates the First, Fourth and Fourteenth Amendments to the United States Constitution.

In support of their contention that the failure to provide for a jury trial is a constitutional infirmity in the statute, appellants quote from opinions of justices of this Court, which opinions are dissents or opinions by intermediate courts. An interesting feature of appellants' attitude on this point is expressed in the note at the bottom of page 23 of appellants' jurisdictional statement in which it is said by appellants:

> "This question is posed *arguendo* for appellants do not accept the view that any book in the United States should be at the mercy of a vote of the 'common conscience' of the community."

It is impossible to determine what the position of appellants would have been had a jury been chosen from among the citizens of Geary County, Kansas, and that jury found the subject books obscene. Had the instant action been a criminal proceeding as authorized by another section of

the statute, appellants, of course, would have been entitled to a jury trial on all questions. Appellants, however, in the present proceeding, must ask this Court to find in the First Amendment to the Constitution of the United States some provision requiring a jury, even though the action is in a form which has never provided for a jury in any other application. No rational analysis of the First Amendment can possibly reveal any such requirement.

Appellants urge that the obscenity test, fashioned by *Roth* v. *United States, supra,* and *Manual* v. *Day, supra,* was designed or framed specifically for use by a jury, and therefore only a jury is competent to apply such standards. The Court is reminded this appeal is from a civil action *in rem* against the books themselves. It is well said in 50 C.J.S. 770, *Juries*, Sec. 67:

> "Since . . . the constitutional guaranty of a right to trial by jury does not ordinarily extend to civil actions for the recovery of penalties or enforcement of forfeitures, it is within the power of the legislature to provide that such proceedings shall be summary in nature without any right to trial by jury, where the particular proceeding was not triable by jury at common law . . . Statutes have also been held constitutional which provide for a summary seizure and destruction of gambling implements and devices, property declared to be a nuisance, intoxicating liquors kept for sale contrary to the law, or property used in the illegal sale or manufacture of intoxicating liquor, . . ."

An action *in rem* was not known to the common law (1 C.J.S., Actions, Sec. 52a). In *Furth* v. *State*, 72 Ark. 161, 78 S.W. 759, at page 760, it was said by the Supreme Court of Arkansas:

> "The objection that the act in question does not provide for a jury is a serious one. But this is a pro-

ceeding *in rem* of a civil nature. It is a summary proceeding in the exercise of the police power of the state, under a statute passed to suppress the nuisance of gambling. Gambling was a nuisance at common law, and in such case trial by jury was not a right at common law. It is only in cases where a jury could be demanded as a matter of right at common law that the refusal of a jury under our Constitution is ground for reversal."

To the same effect see *Frost* v. *People*, 193 Ill. 635, 61 N.E. 1054; *Kite* v. *People*, 32 Col. 5, 74 Pac. 886; *State* v. *Klondike*, 76 Vt. 426, 57 Atl. 994; *Cambria* v. *Bachmann*, 93 W. Va. 463, 118 S.E. 336; *People* v. *One Pinball Machine*, 316 Ill. App. 306, 44 N.E.2d 949; *State Conservation District* v. *Brown*, 335 Mich. 343, 55 N.W.2d 859; *Van Oster* v. *Kansas*, 272 U.S. 465; *State* v. *Lee*, 113 Kan. 462, 215 Pac. 299.

Sec. 21-1102c provides in pertinent part:

"At such hearing, the judge or justice issuing the warrant shall determine whether or not the item or items so seized and brought before him pursuant to said warrant were kept upon the premises where found in violation of any of the provisions of this act. If he shall so find, he shall order such item or items to be destroyed by the sheriff or any duly constituted peace officer by burning or otherwise. . . ."

This proceeding is brought under an act of the legislature passed in the exercise of the police power of the state to suppress the nuisance of keeping obscene material for sale or distribution. This Court has never indicated that the only trier of facts capable of applying the standards of obscenity laid down by it is a jury. We are at a loss to see why any judicial officer is less capable than a jury to determine what is essentially a mixed question of law and fact.

Appellants' contention that the statute and state's procedure under it are unconstitutional for the reason that the statute purports to authorize and the procedure to carry out a "prior restraint" in violation of the First Amendment of the Constitution of the United States on authority of *Near* v. *Minnesota*, 238 U.S. 697, is untenable. In the first place there was here no "prior restraint", the books furnished to the judge prior to issuance of the search warrant having been acquired by the attorney general in the market place. But this Court, although admittedly it has in numerous recent decisions found the First Amendment to be binding on the states via the Fourteenth, has specifically rejected the proposition that "prior restraint" of material under the protection of the First Amendment's guarantee of freedom of speech and press is *per se* a violation of the First Amendment (*Times Film Corp.* v. *City of Chicago*, 365 U.S. 43).

That case involved a motion picture, which medium of expression, as this Court is fully aware, has been granted the same protection under the First Amendment as books, newspapers, etc. (*Burstyn* v. *Wilson*, 343 U.S. 495, 96 L. Ed. 1098, 72 S. Ct. 777).

In the *Times Film Corporation* case, however, the Court had before it only the issue of "prior restraint" being a violation of the First and Fourteenth Amendments. The city required the submission of a film to a board of review before exhibition, which petitioner corporation sought to enjoin. At page 44 it was said:

> "Its sole ground is that the provisions of the ordinance requiring submission of the film constitutes, on its face, a prior restraint within the prohibition of the First and Fourteenth Amendments."

At page 47-48, the Court said:

> "It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, in *Near* v. *Minnesota* [citation], Chief Justice Hughes, in discussing the classic legal statements concerning the immunity of the press from censorship, observed that the principle forbidding previous restraint 'is stated too broadly, if every such restraint is deemed to be prohibited. . . .' Some years later, a unanimous Court, speaking through Mr. Justice Murphy, in Chaplinsky v. New Hampshire, [citation] held that there were 'certain well-defined and narrowly limited classes of speech, the *prevention* and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting words—those by which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'"

And again, at page 50:

> "Certainly petitioner's broadside attack does not warrant . . . our saying that—aside from any consideration of the other 'exceptional cases' mentioned in our decisions—the State is stripped of all constitutional power to *prevent*, in the most effective fashion, the utterance of this class of speech."

To the same effect see *Smith* v. *California*, 361 U.S. 155.

Appellants, in their jurisdictional statement, indicate that the procedure leading to the issuance of the warrant in this case is a close parallel of the procedural facts considered by this Court in *Marcus* v. *Search Warrant*, 367 U.S. 717. Nothing could be further from the situation. The 1961 session of the Kansas legislature passed the act providing the procedure for the instant action and ad-

journed *sine die* in April, 1961. *Marcus* came down in June, 1961. The procedure in the instant action was prepared with careful attention to that case, as well as to the procedure in the Kansas statute. The statement of facts hereinbefore set out shows the trial judge to have been furnished a copy of the opinion in *Marcus* before the warrant was issued. This was no blanket or general warrant procedure.

Appellants' attack on the procedure leading to the issuance of a warrent is two-fold: (1) That the "Information" authorized by Sec. 21-1102c, being verified upon information and belief, will not justify the issuance of a search warrant in that it does not give the magistrate reasonable grounds upon which to issue such warrant; and (2) that the statute (21-1102c) is defective in that it makes no provision for notice and hearing prior to the issuance of such warrant.

Issuance of a warrant by a magistrate to search for contraband or forfeitable material and to seize same, to be brought before said magistrate, is well established in Kansas (G.S. 1949, 21-944; 21-925) and the magistrate's authority, after notice and hearing, to cause such material to be destroyed (G.S. 1949, 21-925, 926, 927 and 947) is also established. Since 1895, the foregoing procedure (seizure and destruction of gambling paraphernalia) has been a part of the Kansas statutes. Such proceedings are *in rem* and closely parallel the procedure authorized by 21-1102c in the instant cause. Similar *in rem* proceedings are authorized for impure or unsafe food or drugs under the Kansas Food, Drug and Cosmetic Act (G.S., 1961 Supp., 65-680). Such procedure is of course well known in the enforcement of liquor laws. Such proceedings are generally recognized and utilized in other

jurisdictions (79 C.J.S. 927, *Searches and Seizures*, Secs. 115-117).

The statute here in question (21-1102c) specifically provides for the issuance of a warrant by certain named judges when such judge "shall receive an information or complaint, signed and verified *upon information and belief* by the county attorney or the attorney general. . . ." That such an affidavit, *i. e.*, upon information and belief, will suffice to give a magistrate the right to believe there is probable cause for issuance of the search warrant has been upheld in many states (*Hudgens* v. *State*, 74 Okl. Cr. 56, 112 P.2d 815; *Smith* v. *State*, 191 Md. 329, 62 A.2d 287, 5 A.L.R.2d 386; *Rose* v. *State*, 171 Ind. 662, 87 N.E. 103; *State* v. *Kees*, 92 W. Va. 277, 114 S.E. 617, 27 A.L.R. 681; *State* v. *Peterson*, 27 Wy. 185, 194 Pac. 842, 13 A.L.R. 1284; *Rozner* v. *State*, 109 Tex. Crim. 127, 3 S.W.2d 441; *Smith* v. *State*, 114 Tex. Crim. 315, 23 S.W.2d 387, 24 S.W.2d 1095; *Parrack* v. *State*, 154 Tex. Crim. 532, 228 S.W.2d 859; *Bergman* v. *State*, 189 Wis. 615, 208 N.W. 470; *Frihart* v. *State*, 189 Wis. 622, 208 N.W. 469; *Marshall* v. *Commonwealth*, 140 Va. 541, 125 S.E. 329; *Nash* v. *State*, 171 Miss. 279, 147 So. [illegible]; *Commonwealth* v. *Schwartz*, 82 Pa. Sup. 369).

But in the instant cause, in addition to the verified Information, there were placed before the Court, prior to issuance of the warrant, seven volumes of the thirty-one volumes named in the Information, each of which volumes bore the same publisher's identification, to wit: "This is an original Nightstand Book", as did each of the volumes named in the Information (R. 5). The Court, *ex parte* in chambers, scrutinized said seven books, as shown by the Journal Entry (R. 16) Whereupon, the Court found reasonable grounds upon which to issue the warrant requested in the state's Information (R. 5).

Although 21-1102c does not specifically provide for evidence *aliunde* the verified Information as a prerequisite to issuance of the warrant there authorized, this procedure was followed by the state on the authority of *Marcus*. In that case, search warrants were issued by the Circuit Court of Jackson County, Missouri, purporting to authorize the search for and seizure of obscene magazines to be found on the premises of the Kansas City News Distributors. The statute in question under which the warrants were issued was similar to 21-1102c. It provided for notice and hearing and for destruction procedure if, at the hearing, the magistrate found the matter so seized to be obscene. The warrant in that case, however, was general in nature, simply ordering the officers executing said warrant to search "within 10 days after issuance of this warrant by day or night and seize obscene materials and take same into your possession". Under this warrant, the officers sorted through all the materials on the named premises and took such publications as, *in the opinion of the officers*, were obscene.

This Court first reviewed at length the history of search and seizure and methods exercised throughout the history of the common law to suppress obscene publications. However, the Court's opinion was based on procedural factors discussed, commencing at page 731, as follows:

> "We believe that Missouri's procedures *as applied* in this case lacked the safeguards which *due process* demands to assure non-obscene material the constitutional protection to which it is entitled. Putting to one side the fact that no opportunity was afforded the appellants to elicit and contest the reasons for the officer's belief, or otherwise to argue against the propriety of the seizure to the issuing judge, still the war-

> rants issued on the strength of the conclusory assertions of a single police officer, *without any scrutiny by the judge of any materials considered by the complainant to be obscene.* The warrants gave the broadest discretion to the executing officers; they merely repeated the language of the statute and the complaints, *specified no publications,* and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene . . . publications.' . . . It is no reflection on the good faith or judgment of the officers to conclude that the task they were assigned was simply an impossible one to perform with any realistic expectation that the obscene might be accurately separated from the constitutionally protected. They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure *before seizure* designed to focus searchingly on the question of obscenity." (Our emphasis)

In the light of this language appellee carefully framed the procedure in the instant cause with a view to meeting the objections to the Missouri procedure in *Marcus.*

This Court carefully declined to find that the Missouri statute, as such, was constitutionally infirm. It was said, in this connection, at page 738:

> "Nor is it necessary for us to decide in this case whether Missouri lacks all power under its statutory scheme to seize and condemn obscene material. Since a violation of the Fourteenth Amendment infected *the proceedings,* in order to vindicate appellants' constitutional rights the judgment is reversed, and the cause is remanded for forther proceedings not inconsistent with this opinion."

Thus, in the instant case, the Information filed with the trial court was accompanied by a substantial sampling of books to be scrutinized by the magistrate to whom the petition for search warrant was directed. Further, the Information named specific book titles, as did the search warrant, which gave the officers no choice in executing the warrant as to the matter to be searched for and seized. Appellants complain that the judge below had only a limited time at the *ex parte* hearing during which to scrutinize the example books furnished him preliminary to issuance of the warrant. In support of his contention that this prevented the Court from having a reasonable basis to believe the books named in the Information were obscene, appellants cited a New York case (*People* v. *Bantam Books* and *People* v. *Carr*, 172 N.Y.2d 515). That case, of course, was a criminal prosecution with the destruction of the books ancillary thereto, and the quoted matter in appellants' brief shows that the matter before the New York court was whether or not all the members of the grand jury had sufficient time to read the book concerned prior to returning an indictment. The judge issuing the warrant in the instant case states in his preliminary finding that he scrutinized the books tendered to him (R. 5). The *ex parte* hearing at which this finding was made commenced at 8:30 p.m., July 25, 1961 (R. 5). However, the record further shows that the Court was furnished the Information and the example books at the judge's home at about 5:00 o'clock p.m. of the same day (R. 22). The Court had only to find reasonable grounds or probable cause to believe the books named in the Information and warrant were obscene (79 C.J.S. 872, *Searches and Seizures*, Sec. 74f).

Appellants' second proposition for the infirmity of the warrant (to wit, that before a warrant is issued in such case there must be a notice and adversary hearing)

is so novel as to make authority for or against said proposition almost non-existent. Search warrants of all kinds traditionally are issued as a result of *ex parte* proceedings (79 C.J.S. 866, *Searches and Seizures*, Sec. 74c) and usually in considerable secrecy. The reason for this is patent. If in fact the material to be searched for and seized is obscene material or gambling paraphernalia, the persons possessing it would need no finer insurance against prosecution or even loss of the property than prior notice that the state had discovered the whereabouts of such contraband.

Our statute provides that execution of the warrant shall be accompanied by notice to the owners or custodian of any material so sought of a hearing at an early date, but requires ten days' notice. Perusal of the record will show that any delays in the hearing in the instant cause on the merits were occasioned by Appellants through the filing of sundry motions, including a motion for continuance (R. 9, 11, 12).

At no place does the record show Appellants to have been deprived of an opportunity to be heard on any matter filed by them nor any delay in the trial and decision on the merits occasioned by the state or by the Court. Thus, all the requirements set up by this Court in *Marcus* have been met.

One of these requirements certainly cannot be said to have been notice and hearing before issuance of the warrant.

CONCLUSION

In view of the foregoing, it is urged this Court should dismiss Appellants' appeal herein for want of a substantial federal question.

Respectfully submitted,

WILLIAM M. FERGUSON,
Attorney General,
State House,
Topeka, Kansas,
Attorney for Appellee.

Of Counsel:

ROBERT E. HOFFMAN,
Assistant Attorney General,
WILLIAM CLEMENT,
County Attorney of Geary
County, Kansas.